

## Fashion Apparel Law Blog

April 15, 2011 by Sheppard Mullin

### **Tweet Me! - The Southern District of New York Answers Copyright Questions Raised By Twitter and Twitpic Use**

Social media has become a part of everyday life. As Shakespeare has written: "This news is not old enough, yet it is every day news." The minutiae of every moment is narrated through status updates. Digital photographs are taken and instantaneously posted minute-by-minute on the Internet for the world to see. This lightning fast use of social media raises new and different intellectual property challenges which have not been previously addressed by courts. On January 14, 2011, the Southern District of New York addressed a particularly interesting copyright question raised by the use of Twitpic – a service that allows users to post pictures to the Twitter microblogging and social networking website. [Agence France Presse v. Morel, 2011 WL 147718 \(S.D.N.Y. Jan. 14, 2011\)](#).

On January 12, 2010, Morel, a photographer who has worked in Haiti for over twenty-five years, took photographs in Port au Prince of the earthquake hit and its immediate aftermath. Although communication throughout Haiti was disrupted, Morel was able to access the internet, upload his photos on Twitpic, post on Twitter that he had "exclusive earthquake photos", and link his Twitter page with his Twitpic page. [Morel](#), 2011 WL 147718 at \*1. Moments after posting Morel's photographs went viral. Lisandro Suero copied the photographs, posted them on *his* Twitpic page and tweeted that *he* had "exclusive photographs of the catastrophe for credit and copyright." [Id.](#) at \*2. Later that day, a photo editor from Agence France Presse, a French news agency that offers an international photo service to media worldwide, downloaded thirteen of Morel's photographs from Suero's Twitpic page, placed the photographs on Image Forum, attributed them to Suero and transmitted them to Getty Images, an image licensing company. After fencing through cease and desist letters, the dispute was brought before a federal court. In December 2010, Agence France Presse brought a declaratory judgment action, alleging that it did not infringe Morel's copyrights in his photographs based upon an express license. Morel counterclaimed, alleging, among other things, violations of the Copyright Act.<sup>[1]</sup> Agence France Presse moved to dismiss Morel's counterclaims. Agence France Presse's motion was denied with respect to Morel's copyright infringement claims.

In arguing against copyright infringement, Agence France Presse stated that it had an express license to use Morel's images based upon the Twitter and Twitpic Terms of Service. In arguing for dismissal of the copyright infringement claims, Agence France

Presse alleged that it had an express license to use Morel's images. District Judge William H. Pauley acknowledged that the existence of a license is a valid defense to a copyright infringement claim. After all, "it is a hallmark principal of copyright law that licensors may not sue their licensees for copyright infringement." Morel, 2011 WL 147718 at \*5 (quoting Jasper v. Sony Music Entertainment, Inc., 378 F.Supp.2d 334, 339 (S.D.N.Y. 2005)). However, Judge Pauley ultimately concluded that Agence France Presse did not possess a valid license to use Morel's photographs. Judge Pauley observed that the Terms of Service for Twitter and Twitpic "[b]y their express language . . . grant a license to use content only to Twitter and its partners. Similarly, Twitpic's terms grant a license to use photographs only to Twitpic.com or affiliated sites." Morel, 2011 WL 147718 at \*6 (Emphasis added). Because Agence France Presse did not claim that it was a partner of Twitter or an affiliate of Twitpic, Judge Pauley held that it had not met its burden to establish that it had a license to use Morel's photographs.

Agence France Presse alternatively argued that it was a third party beneficiary of the license agreement between Morel and Twitter and Twitpic. Judge Pauley noted that, to qualify as a beneficiary, the contracting parties must have intended to benefit that individual, an intent which must appear in the terms of the agreement. Morel, 2011 WL 147718 at \*6. Agence France Presse argued that Twitter's Terms of Service encouraged and permitted broad re-use of content by third parties and that this demonstrated an intent to confer a license upon third parties. Judge Pauley reasoned that such language, while encouraging and promoting re-use of content, did not necessarily demonstrate such an intention. He held: "That language is ambiguous and insufficient to establish on the pleadings that Morel 'understood that the promisee [Twitter] had [the] intent' to confer a license on other users." Id. As a result, Judge Pauley found that Agence France Presse failed to establish that it was an intended third party beneficiary.

Although this is a district court ruling on a motion to dismiss and not a final decision on the merits, Agence France Presse v. Morel is instructive in that it underscores the importance of paying careful attention to the provisions of the Terms of Service when analyzing the rights and risks associated with the use of User Generated Content in the context of social media. As world communications become more and more viral, courts will be asked with increasing frequency to determine which uses of content infringe the laws of copyright and trademark and which do not. Prudent and careful users will review the applicable Terms of Service Agreements on sites like Twitter, MySpace and Facebook and scrutinize how these agreements impact intellectual property rights when those users share content with the world.

---

[1] Morel also counterclaimed for violations of the Digital Millennium Copyright Act ("DMCA") and violations of the Lanham Act. The motion to dismiss was denied with respect to the DMCA allegations, but granted with respect to Lanham Act violations. This holding is noteworthy in that it echoes Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 32 (2003), in finding that an author may not use the Lanham Act to protect originality and creativity. In Dastar, the Supreme Court found that

Section 43(a) of the Lanham Act, which governs trademarks cannot be invoked as an end run around the copyright laws or to add another layer of protection for copyright holders. Morel, 2011 WL 147718 at \*10. Consequently, Judge Pauley held that Dastar and its progeny foreclosed Morel's Lanham Act counterclaims for false representation and false advertising. These claims were consequently dismissed.